INDEX

Index—Continued

CITATIONS

Cases:

Cases—Continued

Constitution, statutes and regulations—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU, ET AL., PETITIONERS

v.

ALAN H. NICHOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c-6, 2000d, and 2000h-2, with respect to denials of equal educational opportunity based on national origin, and we accordingly participated in this case in the court of appeals as *amicus curiae* in support of the petitioners, and filed a memorandum in this Court in support of the petition for a writ of certiorari. We have previously expressed the government's view that a school dis-

trict may be constitutionally required to provide programs to meet the special educational needs of racial or ethnic minority group children. See Memorandum for the United States as Amicus Curiae in *Keyes* v. *School District No. 1*, No. 71-507.[1]

The holding of the court of appeals in this case that respondents' practices do not violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (App. 120-121, n. 6), is contrary to the administrative construction given Section 2000d by the Department of Health, Education, and Welfare (Pet. Br. App. 1a-3a). The outcome of this case may thus affect the government's enforcement responsibilities under federal law where federal financial assistance is extended to school districts attended by large numbers of national origin-minority group children.

STATEMENT

The essential facts in this case are not in dispute. English is the language of instruction in the public schools of San Francisco and is the native tongue of most of the students. There are, however, 2,856 Chinese-speaking students in the school district who do not speak or understand English. Some of these students (1,066) receive special help on a part-time or full-time basis.[2] But the rest (1,790), represented

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[1] Because the case was decided on other grounds, the Court had no occasion to reach this issue.

[2] These students receive special help under the experimental "Chinese Bilingual Pilot Program" conducted by the school district (App. 38-39, 45). Nothing in the record indicates that the students who participate in this program

in this class action by petitioners, receive no assistance at all in learning the English language.

Consequently, while they are provided "the same facilities, textbooks, teachers and curriculum as is provided to other children in the district" (App. 128), they cannot read their textbooks, cannot understand their teachers, and cannot participate in classroom discussion. The result, as respondents themselves have stated, is that the non-English speaking child is "frustrated by [his] inability to understand the regular class work" (App. 101), performs poorly in school (App. 103), and "is almost inevitably doomed to be a dropout and become another unemployable in the ghetto" (App. 103-104).

Petitioners sought an injunction requiring the school district to provide them special instruction in English. They argued that respondents' failure to provide such instruction violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.* The district court denied relief (App. 113-115), and the court of appeals affirmed, with one judge dissenting (App. 116-139). The court of appeals held that, because petitioners' lack of proficiency in the English language "was not caused directly or indirectly by any State action" (App. 127), respondents have no duty to provide special instruction in English.

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are more in need of assistance or have greater ability to benefit from special instruction than the students in petitioners' class.

ARGUMENT

INTRODUCTION AND SUMMARY

The development of universal and compulsory education has led to the parallel development of legal principles to protect minority group children required to attend schools dominated by other racial, ethnic, or religious groups. See *Meyer* v. *Nebraska*, 262 U.S. 390; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *Abington School District* v. *Schempp*, 374 U.S. 203; *Brown* v. *Board of Education*, 347 U.S. 483; *Wisconsin* v. *Yoder*, 406 U.S. 205. In San Francisco, as in the United States generally, English is the dominant language, and the school authorities have chosen it as the language of instruction. While that seems a reasonable decision, its effect is to disadvantage a substantial number of children in the district who speak and understand only Chinese.

In our view, both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 impose upon the school authorities in such circumstances an obligation to provide some special instruction to national origin-minority group students within their district who do not have proficiency in the English language sufficient to allow them meaningfully to participate in the educational program which is readily accessible to their English-speaking classmates. Respondents' failure to provide such instruction means, for petitioners, "[d]enial of access to the dominant culture, [and] lack of

opportunity in any meaningful way to participate in political and other public activities * * *." *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 866 (C.A. 5), affirmed on rehearing *en banc*, 380 F. 2d 385 (C.A. 5), certiorari denied *sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840.

The court below dismissed petitioners' claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.*, as though it were merely cumulative of the rights embodied in the Fourteenth Amendment's guarantee of equal protection. This disposition misconstrues the Act and ignores the regulations and guidelines adopted by the Department of Health, Education, and Welfare. Although intimately connected with equal protection guarantees, Title VI is grounded upon the right of the federal government to condition its grants of financial assistance with reasonable restrictions. HEW has determined—and its construction of the Act is "entitled to great weight" (*Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210)—that compliance with Title VI requires a school district to take affirmative steps to rectify the language deficiency of students where the deficiency "excludes national origin-minority group children from effective participation in the educational program offered by [the] school district" (Pet. Br. App. 1a-2a). Because the school district failed to take such steps here, petitioners are entitled to relief under Title VI regardless of the merit of their constitutional claim.

In our view, therefore, the Court need go no further; it may dispose of the case on the basis of the statute alone. We submit, however, that the court of appeals incorrectly decided the constitutional issue as well. It assumed, erroneously, that the school district's sole obligation under the equal protection clause is to provide for all its students the same facilities and curriculum, even though it is aware that a large and easily identifiable segment of non-English speaking students lacks the capacity to derive any educational benefit whatever from those facilities and curriculum. That narrow and mechanical view of equal educational opportunities cannot be reconciled with this Court's holdings in *Brown* v. *Board of Education, supra, Sweatt* v. *Painter*, 339 U.S. 629, and *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637.

The State of California compels petitioners to attend school (Cal. Educ. Code § 12101); declares that its policy is to ensure the mastery of English by all pupils in the public schools (Cal. Educ. Code § 71); places certain disabilities on persons who do not communicate in or understand English (Cal. Civ. P. Code §§ 185 and 198(3)); and requires proficiency in the English language as a prerequisite to high school graduation (Cal. Educ. Code § 8573). In these circumstances, respondents' decision to deny petitioners any assistance in learning the language of instruction in the schools excludes them from the educational program because of a national origin-related characteristic, just as effectively as would a policy of barring them from the schoolhouse. This unequal

treatment, unless required by some compelling state interest, is a constitutionally impermissible act of *de jure* discrimination, from which petitioners are entitled to relief.

Respondents have suggested no state interest, compelling or otherwise, to justify the discriminatory treatment of Chinese-speaking students. Indeed, that practice defeats, rather than furthers, the State's established educational policy of educating all public school children and ensuring that all master the English language.

Granting relief in this case will not require the judiciary to substitute its judgment for that of the responsible local officials on questions of educational policy, nor will it imply that the nation's public schools must remedy every educational handicap or raise every student's learning skills to the level of the most proficient. The issue here is a narrower one. Respondents have established English as the language of instruction; they are aware that a large group of Chinese-origin children who are required to attend the schools cannot speak or understand English; and yet they have declined to make *any* effort to assist those children in learning English, even though there are practicable methods for doing so. Thus, the question is whether a school district may, consistent with the Fourteenth Amendment and its statutory obligations under Title VI, knowingly deprive a large ethnic minority of the minimal skills necessary to secure a basic education. The answer to that question is no.

I

RESPONDENTS' FAILURE TO TEACH ENGLISH TO PETITIONERS VIOLATES TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Respondents have selected English as the language of instruction in the San Francisco public schools, and they have refused to teach that language to a large number of Chinese-origin children who cannot understand English. That practice, we submit, violates the statute.

Requiring Chinese-speaking children to sit in classes conducted in a language they do not understand and to stare at textbooks they cannot read plainly has the prohibited effect of excluding them from participation in, denying them the benefits of, and subjecting them to discrimination under the school district's educational program. The impact of that practice is upon a distinct segment of a national origin-minority group, whose members are affected on account of a national origin characteristic. Since it is

undisputed that the San Francisco Unified School District receives federal financial assistance under a variety of programs (see App. 36-39), it follows that the failure to teach petitioners English violates Section 601.

This conclusion is fortified by the regulations and guidelines issued by the Department of Health, Education, and Welfare pursuant to Section 602 of the Act, 42 U.S.C. 2000d-1.[8] The regulations specify (45 C.F.R. 80.3(b)(1)) that recipients of federal financial assistance under any program administered by HEW may not, on the ground of race, color, or national origin:

> (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
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> * * * *
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
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> * * * *

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[8] Section 602 provides in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. * * *

> (vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program * * *.

In programs for support of the operation of elementary or secondary schools, "discrimination by the recipient school district in any of its elementary or secondary schools * * * in the treatment of its students in any aspect of the educational process, is prohibited"; the prohibition includes "discrimination among the students * * * in the availability or use of any academic * * * or other facilities of the grantee or other recipient" (45 C.F.R. 80.5 (b)).

These prohibitions are not limited to affirmative acts that are designed to discriminate among the students on account of race or national origin; they embrace as well practices that have an impermissible *effect* regardless of the innocence of their design. Thus, in determining what benefits are to be provided under an HEW program of financial assistance, or what class of individuals is to be benefited, a recipient "may not * * * utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination * * *, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin" (45 C.F.R. 80.3(b)(2) (emphasis added)).

The challenged conduct has precisely those effects. Respondents' refusal to teach English to the Chinese speaking minority in effect deprives the members of that minority of access to a basic education. It thus violates the regulations in several ways: it provides to the Chinese-speaking minority benefits different from those provided to others under the district's educational program (45 C.F.R. 80.3(b)(1)(ii)); it restricts them in the enjoyment of the benefits enjoyed by the English-speaking majority (45 C.F.R. 80.3(b)(1)(iv)); it denies them a meaningful opportunity to participate in the district's educational program (45 C.F.R. 80.3(b)(1)(vi)); it discriminates against them in the educational process (45 C.F.R. 80.5(b), 80.3(b)(2)); and it defeats the objectives of the educational program as respects individuals of Chinese origin (45 C.F.R. 80.3(b)(2)).

The Department of Health, Education, and Welfare has, moreover, specifically construed the Act and the regulations to proscribe practices like those of respondents. In conducting Title VI compliance reviews pursuant to 45 C.F.R. 80.7, the HEW Office for Civil Rights found in 1970 that certain common practices by school districts were effectively denying equality of educational opportunities to national origin-minority group children with English language deficiencies. It accordingly issued, on July 10, 1970, a memorandum of guidelines designed to clarify its policy "concerning the responsibility of school districts to provide equal educational opportunity" to

such children (Pet. Br. App. 1a). The memorandum provides in part (*id.* at 1a-2a):

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

The memorandum thus reflects a finding by the federal agency with special competence in the area of education that, where a school system employs English as the basic language of instruction but provides no special assistance to non-English speaking students who comprise a significant portion of the system's enrollment, those students are impermissibly excluded from participation in, denied the benefits of, and subjected to discrimination under the system's educational program, on account of their national origin. This "consistent administrative construction of the Act," like the Department's formal regulations, is "entitled to great weight." *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210. See, also, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1. There is nothing in this record to contradict HEW's finding. Indeed, as we demonstrate below, the record fully supports that finding.[4]

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[4] Respondents are, moreover, obligated by contract to comply with both the regulations and the guidelines. In consideration of receiving federal financial assistance under programs ad-

Respondents' practices thus violate Section 601 on its face and as authoritatively construed by the pertinent federal agency. Petitioners are, in these circumstances, entitled to relief under the statute.[5] The court of appeals, however, rejected their claim summarily, stating in a footnote (App. 120-121, n. 6) that Section 601 prohibits only "affirmative action by which a person is 'excluded' from participation, 'denied' the benefits, and 'subjected' to discrimination," and that the court's determination of petitioners' constitutional claim "will likewise dispose of the claims made under the Civil Rights Act." Both statements are incorrect.

First, the statute nowhere states or implies that it is meant to bar only affirmative acts of discrimination while permitting discrimination that results

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ministered by HEW, the school district has contractually agreed to "comply with title VI of the Civil Rights Act of 1964 * * * and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 C.F.R. Part 80) issued pursuant to that title * * *," and "immediately [to] take any measures necessary to effectuate this agreement" (Pet. Br. App. 4a). The contract is binding and specifically enforceable. See *United States* v. *Sumter County School District*, 282 F. Supp. 945 (E.D. S.C.).

[5] It is settled that petitioners, as representatives of the class of affected children, have standing to enforce Section 601, and that injunctive relief is an appropriate remedy. *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (C.A. 5), certiorari denied, 388 U.S. 911; *Natonabah* v. *Board of Education*, 355 F. Supp. 716, 724 (D. N.M.); *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582, 583-584 (N.D. Ill.).

from inaction. Indeed, Section 601 itself uses the passive voice. It does not provide that no person shall discriminate; it provides that no person shall suffer discrimination. As we have shown, the HEW regulations have properly construed the Act, consistent with the obvious legislative intent, to proscribe practices that have a discriminatory *effect*, regardless of their purpose and regardless whether the effect is the result of action or inaction.

But even if the court of appeals has correctly perceived a limitation not apparent on the face of the statute, it is difficult to see why respondents' practices would not be classified as "affirmative action." Although respondents are not responsible for petitioners' lack of English language skills, they have created the circumstances in which that lack of skill has become a crippling deficiency. In the context of state-wide laws compelling attendance at school (Cal. Educ. Code § 12101) and requiring proficiency in the English language as a condition of graduation from high school (Cal. Educ. Code § 8573), respondents' determination to teach only in English and to disregard those students who cannot understand English is an affirmative act of discrimination against the Chinese-speaking minority.

Finally, determination of the constitutional issue in this case need not control the disposition of the statutory question. Title VI, although written in equal protection terms, is neither dependent upon nor necessarily coincident with the Equal Protection Clause of the Fourteenth Amendment. Rather, it is

grounded on the general authority of the federal government to place reasonable restrictions upon the use of federal funds by the recipients.[6]

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.[7]

Thus, the applicability of Title VI here does not depend upon the outcome of the equal protection analysis. Pursuant to the power of Congress to "provide [in its expenditures] for the * * * general Welfare of the United States * * *" (U. S. Constitution, Art. I, Sec. 8, Cl. 1), enhanced like all other congressional powers by Article I's "necessary and proper" clause, the statute independently proscribes the conduct challenged by petitioners and provides a discrete basis for injunctive relief.

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[6] See *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143; *United States* v. *San Francisco*, 310 U.S. 16, 26; *United States* v. *Jefferson County Board of Education*, *supra*, 372 F.2d at 882; *United States* v. *Frazer*, 297 F. Supp. 319, 322 (M.D. Ala.).

[7] 110 Cong. Rec. 6543, Senator Humphrey quoting from President Kennedy's message to Congress, June 19, 1963. See, also, 110 Cong. Rec. 1527-1528, 12675-12677, 13334, 13378, 13416.

II

RESPONDENTS' FAILURE TO TEACH ENGLISH TO PETITIONERS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE IT DEPRIVES AN EASILY IDENTIFIABLE NATIONAL ORIGIN-MINORITY GROUP OF THE BASIC EDUCATION PROVIDED TO THE ENGLISH SPEAKING MAJORITY

In our view, the Court may dispose of this case on the basis of the Civil Rights Act of 1964 and need not adjudicate petitioners' constitutional claim. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (Brandeis, J., concurring). If, however, the Court disagrees with our view of Title VI or prefers not to reach that issue, we submit that petitioners are in any event entitled to relief under the Equal Protection Clause of the Fourteenth Amendment.

A. Respondents' Action Is Subject to Strict Judicial Scrutiny Because It Classifies Students on the Basis of National Origin and Deprives the Disfavored Class of Access to a Basic Education

Respondents have chosen English as the language of instruction in the San Francisco public schools but have failed to make any provision for a substantial group of non-English speaking Chinese children. There can be no doubt that this is state action within the compass of the Fourteenth Amendment.

The issue is whether that state action creates a constitutionally impermissible classification.

1. ***Respondents' practices have the effect of classifying the school district's students and of favoring one class over the other.***

The court of appeals reasoned that respondents have created no classification at all because they have provided all students with "the same facilities, textbooks, teachers and curriculum" (App. 128). In the court's view, since respondents have not caused petitioners' "language deficiency" (App. 127), they cannot be held responsible for petitioners' failure to derive any benefits from the educational program. We disagree.

As this Court has recognized, educational opportunity is not a function solely of buildings, books, and teachers: equal education means more than simply equal access to the material components of an educational program. It presupposes the student's basic capacity to communicate in and comprehend the language of instruction.

In *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, the defendants provided a black graduate student with the same facilities and curriculum as white students but caused him to be segregated within those facilities from all other students. This Court rejected the argument, similar to that of the respondents here, that facilities and curricula are the sole measure of equal educational opportunity. "[E]ffective graduate instruction" was held to include an element of communication—the opportunity "to en-

gage in discussions and exchange views with other students" (*id.* at 641)—which was not susceptible of objective measurement. By depriving the black student of that opportunity, the defendants' practices impermissibly denied him an equal educational opportunity notwithstanding the appearance of objective equality.

Similarly, in *Sweatt* v. *Painter*, 339 U.S. 629, this Court held that the Fourteenth Amendment did not permit Texas to bar a black law student from the University of Texas Law School on account of his race, because the separate school for black students did not provide substantially equal facilities. The Court stated that, even "more important" than the obvious differences in faculty, library, and curriculum, "the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school" (*id.* at 634).

These intangible "considerations apply with added force to children in grade and high schools." *Brown* v. *Board of Education*, 347 U.S. 483, 494. In *Brown*, as in *McLaurin* and *Sweatt*, the Court rejected the argument that equality of educational opportunity can be measured solely in terms of "buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors" (*id.* at 492).

One intangible but indispensable element of an effective education is the student's ability to comprehend the language of instruction. That view, implicit in this Court's decision in *McLaurin*, is also shared

by educators.[8] When both the printed word and the spoken words of teacher and classmates are foreign to a student, he cannot make effective use of the tangible elements of an education. In circumstances such as those presented here, in which a substantial and identifiable national origin-minority group is known to lack even the elementary language skills necessary to comprehend classroom instruction, school officials cannot discharge their constitutional obligations merely by equalizing those tangible elements. For the effect of that "equalization" is to classify the students according to their English language skills and to disfavor the class whose members are incapable of benefiting from the instruction offered.

Respondents are aware that a large group of Chinese children in the San Francisco schools is unable to read, speak, or understand English (App. 101). They also recognize that, as a consequence of their failure to assist those students in learning English, many fail their courses, drop out of school, and become unemployable (App. 101, 103-104).[9] In these

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[8] It is generally accepted that education requires verbal interaction between teacher and student and must therefore take into account the language that the student understands. See Goodman, *Compulsory Mis-education*, p. 21 (1964); Butts and Cremin, *A History of Education in American Culture*, pp. 541-546, 566-567 (1953); Cubberley, *Public Education in the United States*, pp. 513-528 (1934); Bruner, *The Process of Education* (1963); Dewey, *Democracy and Education* (1916).

[9] See also Andersson and Boyer, *Bilingual Schooling in the United States*, Vol. I, p. 48 (1970):

[Footnote continued on page 20]

circumstances, teaching all students in the same way denies an equal educational opportunity to the Chinese speaking minority.

The situation here is similar to that in *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500. The Court there struck down as a denial of equal protection an Act of the Philippine Legislature making it an offense to keep business account books in any language other than English, Spanish, or a Filipino dialect.[10] Though the Act appeared to treat all persons "equally," its effect would have been to drive out of business the Chinese merchants in the Islands, most of whom could not have complied with the Act. There, as here, the facially neutral policy invidiously discriminated against a substantial class of Chinese speaking persons whose language "deficiency" became a disability

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[9] [Continued]
The non-English-speaking child who at the beginning of school is unable to acquire literacy in English in competition with his English-speaking classmates and who is not permitted to acquire it in his own language makes a poor beginning that he may never overcome. Frustrated and discouraged, he seeks the first opportunity to drop out of school; and if he finds a job at all it will be the lowest paying job. He will be laid off first, will remain unemployed longest, and is least able to adapt to changing occupational requirements.

[10] The decision was based on the equal protection clause of the Philippine Bill of Rights, which extended to the Philippine Islands "guarantees equivalent to the due process and equal protection of the law clause of the Fourteenth Amendment" (*Serra* v. *Mortiga*, 204 U.S. 470, 474). The Court accordingly applied " 'substantially the same criteria' " that would be applied in a case arising under the Fourteenth Amendment (271 U.S. at 524).

as a result of that official policy.[11] It did not matter there, and should not matter here, that the government had not caused petitioners' language deficiencies. It was enough that it created the circumstances in which that deficiency became a disabling handicap.

2. The classification—effectively singling out for less favored treatment non-English speaking children of Chinese origin—is constitutionally suspect.

Respondents have, in effect, conditioned access to public education in San Francisco on a child's prior understanding of the English language. The class of those adversely affected includes nearly 1,800 children of Chinese ancestry who speak and understand only the language of their fatherland. The resulting classification is thus drawn along lines of national origin (cf. *Meyer* v. *Nebraska*, 262 U.S. 390, 398-399) and, under the decisions of this Court, is therefore "immediately suspect" and subject to "the most rigid scrutiny." *Korematsu* v. *United States*, 323 U.S. 214, 216. See, also, *Oyama* v. *California*, 332 U.S. 633, 644-646; *Hirabayashi* v. *United States*, 320 U.S. 81, 100.[12]

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[11] The Court there inferred that the Act was designed specifically to affect the Chinese merchants (271 U.S. at 514-515, 528). But it is not important that no such design is evident here. Under the equal protection clause, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect" (*Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462). "It is no consolation to an individual denied the equal protection of the laws that it was done in good faith" (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725).

[12] Although respondents' practices may similarly affect other non-English speaking minorities in San Francisco, that pos-

The Chinese speaking minority in San Francisco bears each of "the traditional indicia of suspectness" that this Court identified in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 28. It is "saddled with such disabilities, * * * subjected to such a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

The California Constitution of 1879, for example, barred "natives of China" from voting (Art. II § 1) and prohibited the employment of Chinese persons by the state, local governments, and corporations (Art. XIX, §§ 2-4). Later, an English literacy voting requirement was enacted by the legislature to exclude American-born children of Chinese immigrants. See *Castro* v. *State*, 2 Cal. 3d 223, 230, n. 11, 466 P. 2d 244, 248, n. 11. Until 1947, state legislation authorized the establishment of "separate schools * * * for children of Chinese, Japanese, or Mongolian parentage" (Cal. Educ. Code (1943 ed.) § 8003). See *Guey*

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sibility does not alleviate the discriminatory impact on petitioners' class and is constitutionally immaterial. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S. 1, 22. See, also, *Takahashi* v. *Fish Commission*, 334 U.S. 410, 413; *Oyama* v. *California*, 332 U.S. 633, 646. Nor is the constitutionally suspect nature of this class altered by the fact that respondents have chosen to give some English language training to another, smaller group of Chinese speaking children. A classification based on race or natural origin is no less suspect merely because some or even many persons of that race or nationality are unaffected. See, *e.g.*, *Phillips* v. *Martin Marietta Co.*, 400 U.S. 542; *Yu Cong Eng* v. *Trinidad*, *supra*, 271 U.S. at 512.

Heung Lee v. *Johnson*, 404 U.S. 1215 (per Douglas, Circuit Justice). San Francisco established such separate schools for Chinese-origin chlidren. See *Wong Him* v. *Callahan*, 119 Fed. 381 (C.C. N.D. Cal.). Other legislation permitted local governments to adopt ordinances excluding Chinese persons from residence within their boundaries or requiring them to live within segregated areas. Ch. 29, 1880 Cal. Stats. 22. See, also, *Yick Wo* v. *Hopkins*, 118 U.S. 356.

In the context of this history of discrimination against the Chinese minority, respondents' choice of English as the language of instruction,[18] coupled with

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[18] Respondents could have decided upon a multi-lingual curriculum. Although state law prior to 1967 required all schools to teach in the English language (Cal. Educ. Code (1943 ed.) § 8251), the statute now permits bilingual instruction (Cal. Educ. Code § 71). The California Bilingual Education Act of 1972 provides for financial assistance to school districts that wish to establish bilingual programs (Cal. Educ. Code § 5761, *et seq.*). Among the legislative findings recited in that Act (§ 5761) are these:

> The inability to speak, read and comprehend English presents a formidable obstacle to classroom learning and participation which can be removed only by instruction and training in the pupils' dominant language.
>
> * * * *
>
> The Legislature finds and declares that a primary goal of such programs is, as effectively and efficiently as possible, to develop in each child fluency in English so that he may then be enrolled in the regular program in which English is the language of instruction.

Other states have also enacted statutes requiring or permitting bilingual programs. See 2C Ann. Laws of Mass., c. 71A, §§ 1-9 (mandatory in certain circumstances); Laws of the 63rd Legislature of the State of Texas, c. 392, p. 860;

their refusal to teach English to a large group of Chinese speaking children, creates an inherently suspect classification, the consequence of which, in contrast to the situation in *Rodriguez*, is that the members of petitioners' class suffer an "absolute deprivation of education" (411 U.S. at 25). The classification therefore calls for close judicial scrutiny; it can be justified only on a showing that it is necessary to accomplish a compelling state objective. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 11; *McLaughlin* v. *Florida*, 379 U.S. 184, 192-193. The respondents cannot, and indeed have not even attempted to, make that showing here.

B. Respondents Have Not Shown That Their Action Is Required to Serve Any Compelling State Interest or Even That It Is Rationally Related to Any Legitimate State Purpose

Respondents have suggested no state interest, compelling or otherwise, that would justify the discriminatory effects of their policies on the Chinese speaking minority. Indeed, they have not even made the minimal showing required to support racially innocuous classifications—that "the challenged state action

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Alaska Educ. Statutes, § 14.08.160 (mandatory in certain cases); 5A Kan. Stat. Ann., § 72-1101; 11 Me. Rev. Stat. Ann., Title 20, § 102(16); 2-A N.H. Rev. Stat. Ann., § 189-19; 11 N. Mex. Stat. Ann., § 77-11-12; 16 N.Y. Educ. Law, §§ 3204, 4404; Pa. Stat. Ann., Title 24, § 15-1511.

Indeed, foreign languages have historically been used as a medium of instruction in the public schools of the United States, particularly before the Civil War and before World War I. See, *e.g.*, Andersson and Boyer, *Bilingual Schooling in the United States*, Vol. I, pp. 17, 35-36 (1970).

rationally furthers a legitimate state purpose or interest" (*Rodriguez, supra*, 411 U.S. at 55).

The court below stated that "the State's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established" (App. 127). While that may justify the use of English, it plainly does not support respondents' refusal to teach English to petitioners, who are thereby denied the very "educational and socializing" benefits sought to be furthered.

Indeed, respondents' failure to assist petitioners in learning the language of instruction defeats rather than promotes California's educational program. The state requires petitioners to attend school (Cal. Educ. Code § 12101), declares that its policy is "to insure the mastery of English by all pupils in the schools" (Cal. Educ. Code § 71), and requires proficiency in the English language as a condition of high school graduation (Cal. Educ. Code § 8573). By establishing English as the language of instruction and refusing to teach that language to petitioners, respondents deprive a large ethnic minority of access to a basic education and thereby thwart the state's fundamental educational policies. The result is that "the State spites its own articulated goals" (*Stanley* v. *Illinois*, 405 U.S. 645, 653).

The discriminatory treatment of petitioners' class thus cannot withstand even minimal scrutiny, much less the "rigid scrutiny" (*Korematsu, supra*) required for racial classifications. Although this Court

has traditionally deferred to the school board's expertise in matters of local educational policy, that deference does not extend to policies which conflict with the Fourteenth Amendment's guarantees of equal protection. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Green* v. *County School Board of New Kent County*, 391 U.S. 430; *Brown* v. *Board of Education*, 349 U.S. 294 *(Brown II)*. Such deference is even less appropriate where, as here, the school board's policy is itself in conflict with a broader state policy both to educate all children in the state and to insure their mastery of English. Cf. *Griffin* v. *County School Board*, 377 U.S. 218.

III

GRANTING RELIEF IN THIS CASE WILL NOT REQUIRE THE COURT TO FORMULATE LOCAL EDUCATIONAL POLICY AND WILL NOT MEAN THAT SCHOOL DISTRICTS MUST REMEDY EVERY EDUCATIONAL HANDICAP OF EVERY STUDENT

Granting relief to petitioners in this case need not lead the judiciary into "persistent and difficult questions of educational policy" (*Rodriguez*, *supra*, 411 U.S. at 42). The case presents no issue whether one form of instruction is preferable to another. It raises no question concerning the propriety of using English as the basic language of instruction in a public school system.

Petitioners seek only *some* form of reasonable assistance in comprehending the instruction offered to

them. Whether that assistance should be in the form of a bilingual curriculum rather than special training in the English language or some other program is for the informed judgment of the local school authorities,[14] so long as a substantial effort is made. The only issue here is whether the school district may refuse to give any assistance at all to petitioners' class. Resolution of that issue does not require the Court to substitute its judgment for that of the responsible officials.

Nor will a decision in petitioners' favor imply that the nation's schools must give special assistance to every student with an educational deficiency or must seek to raise all students to the level of the most proficient. Those broad principles need not be invoked to resolve the statutory or constitutional issues in this case. The facts here are more limited.

Petitioners are required by state law to attend

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[14] We note that the district is authorized to offer a bilingual curriculum "when such instruction is educationally advantageous to the pupils" (Cal. Educ. Code § 71). The state, pursuant to the Bilingual Education Act of 1972 (Cal. Educ. Code § 5761, *et seq.*), provides financial assistance to school districts that wish to institute bilingual educational programs. See note 13, *supra*. Financial assistance is also made available to elementary school districts that "establish and maintain special programs or classes * * * in speaking, reading and writing the English language for foreign-born minors and native-born minors" (Cal. Educ. Code § 6061).

For discussion of examples of successful bilingual educational programs being conducted elsewhere, see *Learning for Two Worlds*, 8 American Education 28 (November 1972); *Tucson's Tale of Two Cultures*, NEA Journal, February 1967, p. 62.

school. Respondents have established English as the language of instruction in the San Francisco schools, and they are aware that a large group of Chinese children cannot comprehend that language. The state's articulated educational policy is to ensure mastery of English by all students, and to that end it offers financial assistance to school districts that establish programs to teach English to non-English speaking children. Respondents nevertheless have refused to provide *any* such assistance to petitioners' class. As a consequence, a large and easily identifiable ethnic minority, which has historically been subject to invidious discrimination in the California schools, has been denied access to even a basic education, on account of a language deficiency that is inextricably linked to national origin.

Whatever may be the result where a small or indistinct group is affected, or where the deficiency is not a racial or national origin characteristic, or where the students are not deprived of access to a basic education, on the facts presented in this case petitioners have been denied an equal educational opportunity and are entitled to relief under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the judgment below should be reversed and the case remanded for the fashioning of appropriate relief.

Respectfully submitted.

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